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February 7, 1997

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: MM Docket Nos. 94-150, 92-51, and 87-154
Notice of Proposed Rule Making
Policies and Rules Concerning Attribution of Broadcast Interests, Investment
in the Broadcast Industry, and the Commission's Cross-Interest Policy

Dear Mr Caton:

On behalf of CBS Inc., enclosed herewith for filing with the Commission are an original and eleven copies of *Comments of CBS Inc.* in response to the Commission's *Notice of Proposed Rule Making* in the above referenced proceeding.

Should there be any questions concerning this filing, please contact Howard F. Jaeckel at (212) 975-4595, Nicholas E. Poser at (212) 975-3573, or the undersigned at (202) 457-4515.

Respectfully submitted,

CBS Inc.

By:

Stephen A. Hildebrandt, Esq.
Associate General Counsel and Assistant Secretary
CBS Inc.

enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Review of the Commission's)	MM Docket No. 94-150
Regulations Governing Attribution)	
of Broadcast Interests)	
)	
Review of the Commission's)	MM Docket No. 92-51
Regulations and Policies)	
Affecting Investment)	
in the Broadcast Industry)	
)	
Reexamination of the Commission's)	MM Docket No. 87-154
Cross-Interest Policy)	

COMMENTS OF CBS INC.

Howard F. Jaeckel
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Its Attorneys

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COMMENTS OF CBS INC.

CBS Inc. ("CBS"), by its attorneys, hereby submits its comments in response to the Further Notice of Proposed Rule Making ("Further Notice")¹ in the above proceedings, in which the Commission solicits, inter alia, comment on a new proposal to attribute ownership to holders of currently nonattributable equity and/or debt interests in specified circumstances, and further comment on a pending proposal to raise the attribution voting stock benchmarks for both active and passive investors.

¹ FCC 96-436, adopted November 5, 1996; released November 7, 1996.

I. Introduction and Overview

In December 1994, the Commission adopted a Notice of Proposed Rule Making in these proceedings seeking comment on a number of proposed changes in its attribution rules.² Among these were proposals (i) to increase the voting stock benchmark from five percent to 10 percent and the passive investor benchmark from 10 percent to 20 percent; (ii) to attribute nonvoting shares in excess of a specified benchmark; and (iii) to eliminate the “single majority shareholder” exemption. In our Comments submitted in response to that Notice, CBS set forward several general propositions that we believed should guide the Commission’s consideration of the proposed rule changes.

First and foremost we emphasized that the Commission’s application of its attribution rules should ensure certainty and predictability, and urged the adoption, or retention where they exist, of clear rules, which enable current and potential investors in the broadcast industry accurately to anticipate the consequences of contemplated transactions.³ We also expressed the view that the current attribution rules have served the public well by striking an appropriate balance between promoting investment and providing for attribution of ownership interests where there is sufficient influence to merit it. While we supported some proposed liberalization of the rules -- specifically, increasing the voting and nonvoting stock benchmarks -- we suggested that any such relaxation should be accomplished only by the adoption of clear rules. We also argued that any additional attribution restrictions over and above those currently in place

² 10 FCC Rcd 3606 (1995) (“Notice”).

³ We also stated that, as a corollary to this principle, if the Commission chose to change its rules, previously nonattributable interests subject to pending agreements that would be attributable under the new rules should be grandfathered as nonattributable.

would undermine the Commission's goal of ensuring the availability of adequate capital to the industry, and would be ill-advised. We therefore opposed the elimination of the single majority shareholder exemption and the exemption for nonvoting stock.

CBS continues to believe that the need for clarity and the overall record of success of the current rules in promoting the Commission's dual goals should govern its consideration of the proposals offered in both the Notice and the Further Notice. Consequently, it is CBS's view that the Commission should not adopt its "equity or debt plus" proposal. Still valid are the Commission's prior assessments (i) that holders of minority stock interests in corporations with a single majority shareholder and the holders of nonvoting stock interests do not wield influence or control warranting attribution; and (ii) that the exemptions for such holdings serve an important function in facilitating the flow of capital to the industry. Accordingly, we believe these bright-line exemptions should not be limited as the proposal would do.

Should the Commission nevertheless decide that such interests should be made attributable, CBS believes that the "equity or debt plus" proposal, because of its clarity and the certainty with which it can be applied, would be preferable to continued application of the Commission's amorphous cross-interest policy. Assuming the threshold triggering attribution is set at 33 percent and the definition of "program supplier" for purposes of the rule is sufficiently broad so as not to discriminate against broadcast networks, fair and predictable application of the proposal appears possible.

For the same reasons, CBS continues to support raising the voting stock and passive voting stock benchmarks to 10 and 20 percent, respectively, but only if these increases are not accompanied by the introduction of multi-factor analyses that would make the determination of

attributability less predictable. Raising the benchmarks as proposed would continue to provide a clear test of attributability and would enhance capital flow to the industry, without permitting exercise of undue influence or control.

II. The Proposed “Equity or Debt Plus” Attribution Rule

In its Further Notice, the Commission proposes to introduce a new “equity or debt plus” attribution rule in order to limit the exemption currently afforded to minority shareholders in corporations with single majority shareholders and to holders of nonvoting stock. Under the proposal, otherwise nonattributable equity or debt interests in a licensee would be deemed attributable where: (1) the equity and/or debt interest exceeds a specified threshold; and (2) the holder of that interest also (i) is a program supplier to the licensee or (ii) holds an attributable interest in a broadcast station (or other media outlet subject to the broadcast cross-ownership rules) in the same market as the licensee. The Commission proposes to set 33 percent as the equity and/or debt threshold for triggering attribution, and to aggregate equity interests (both nonvoting and voting stock) and debt interests in calculating whether the threshold has been reached. For all the reasons that led the Commission to establish the single majority shareholder and nonvoting stock exemptions -- and for the reasons previously set forth by CBS and other commenters -- it is unnecessary and inadvisable for the Commission to adopt the proposed “equity or debt plus” rule.

With respect to single majority shareholder corporations, there is simply no basis to reverse the Commission’s initial assessment in 1984 that it is “neither necessary nor appropriate to

attribute an interest to any other stockholder.”⁴ As noted in our previous comments, the exemption has provided substantial benefits to the industry. It has been of great value to small licensees seeking investment funds⁵ and to minority-owned media companies.⁶ Conversely, the exemption does not does not facilitate the exercise of undue influence or control. As the Commission itself concluded, in a corporation with a single majority shareholder “the minority interest holders, even acting collaboratively, would be unable to direct the affairs or activities of the licensee on the basis of their shareholdings.”⁷ Any exceptional case of possible abuse of this exemption is more appropriately resolved by reference to the Commission's existing precedents.⁸

Similarly, the nonattributability of nonvoting stock has facilitated significant investment in the broadcast industry, including investment in minority-owned media companies.⁹

⁴ Report and Order in MM Docket No. 83-46, 97 FCC 2d 997, 1008-09 (1984) (Attribution Order”), recon. granted in part, Memorandum Opinion and Order in MM Docket No. 83-46, 58 RR 2d 604 (1985) (“Attribution Reconsideration”), further recon. granted in part, Memorandum Opinion and Order in MM Docket No. 83-46, 1 FCC Rcd 802 (1986) (“Attribution Further Reconsideration”).

⁵ See Comments of CBS Inc. at 10 (May 17, 1995) (“CBS Comments”), and Comments of EZ Communications at 2 (May 17, 1995) (“The company's experience indicates that the prospect of non-cognizability for minority interests has a very positive effect on its ability to attract investors, particularly when the company must compete with wholly unregulated industries for that same capital.”)

⁶ See CBS Comments at 10-11 and n. 16.

⁷ Attribution Order, 97 FCC 2d at 1009.

⁸ See, e.g., KKR Associates, 2 FCC Rcd. 7104, 7107 (1987).

⁹ See CBS Comments at 14, and the example cited therein.

Conversely, CBS agrees with the Commission's original assessment that nonvoting stock, by its very nature, precludes the means to exert undue influence or control.¹⁰

However, if the Commission nonetheless concludes that some limitation on single majority shareholder and nonvoting stock exemptions is necessary, CBS believes that the "equity or debt plus" formula is preferable -- because of its clarity -- to continued application of the cross-interest policy, under which certain combinations of interests have been held impermissible through *ad hoc* Commission review. Our view of any new rule is premised, however, on the adoption of the following features of the proposal.

The Further Notice proposes to set 33 percent as the threshold investment benchmark for triggering attribution. This standard appears reasonable in terms of the dual goals of the attribution rules, but should be set no lower. A 33 percent benchmark would result in attributability for any holding that could conceivably carry undue influence or control. But any lower threshold would prohibit holdings already determined by the Commission "insufficient" to wield such influence.¹¹ A lower threshold would also arbitrarily limit potential sources of capital for media entities, particularly smaller companies and minority-owned companies.

In the Further Notice, the Commission also seeks comment as to how it should define the category of "program supplier" if an "equity or debt plus" rule is adopted. The Commission variously suggests that the category be defined to include "all entities from which a broadcast licensee obtains programming, including program producers, syndicators and networks," or only networks, or any entity that supplies "significant or substantial quantities of programming to

¹⁰ Id. at 14, quoting Attribution Order, 97 FCC 2d at 1020.

¹¹ See Cleveland Television Corp., 91 FCC 2d 1129 (Rev. Bd. 1982).

the licensee.”¹² CBS believes the definition should be based on the quantum of programming supplied to the licensee and should include any type of supplier that meets the threshold chosen. As the Commission notes, program producers and syndicators, no less than networks “may have inherent interests in influencing programming decisions.”¹³ There is no reason to discriminate between networks and other program suppliers if they are supplying the same, substantial amount of programming to a licensee.

The Further Notice then asks, if the Commission chooses to base the definition of program supplier on the amount of programming supplied, what amount of programming should trigger application of the rule. CBS believes the Commission should define the category of “program supplier” as any corporation or entity that supplies 20 percent or more of the licensee’s prime time programming.¹⁴ This benchmark would reach all those entities supplying “significant or substantial quantities of programming to the licensee,” thereby avoiding discrimination among different categories of program suppliers.¹⁵

¹² See Further Notice at ¶20.

¹³ Id.

¹⁴ CBS also submits that the Commission should apply the broadcast attribution rules that emerge from this proceeding to determine how great an interest in a program supplier a person or entity can hold without being deemed a program supplier for purposes of applying an “equity or debt plus” rule.

¹⁵ A 20 percent threshold for all program suppliers would ensure that established networks are not unnecessarily disadvantaged vis-a-vis emerging networks in their ability to invest in licensees with which each, respectively, is affiliated. Similarly, this threshold would prevent other categories of program suppliers -- the major studios, for example -- from gaining investment opportunities denied to networks where those suppliers are supplying substantial amounts of programming to a licensee.

III. Voting Stock Benchmarks

In the Further Notice, the Commission seeks "empirical evidence" that would support the raising of the voting stock attribution benchmark from five to 10 percent and the passive investor benchmark from 10 to 20 percent. Specifically, it reiterates its request made in the Notice (§21) for information that would "verify the link between raising the attribution benchmark and precipitating additional capital investment."¹⁶ CBS submits that it may not be possible to provide "empirical evidence" that could predict with specificity the levels of future investment that a change in the attribution benchmarks would bring. Nevertheless, there are strong indications that raising the benchmarks would attract significant amounts of new capital into the industry.

As CBS stated in its earlier comments,¹⁷ the Commission's issuance in 1984 of the Attribution Order increasing the basic attribution benchmark from one to five percent and of the Report and Order raising the AM, FM and television station ownership limits from seven to 12¹⁸ was followed by a surge in investment. The capital raised for the industry increased from \$614.6 million in 1983 to more than \$6 billion in 1985.¹⁹ It is reasonable to assume that raising the attribution benchmarks now would have a similar beneficial effect.

The Commission's own study of attributable interests set forth in Appendix B to the Further Notice also suggests that raising the voting stock benchmark would result in significant

¹⁶ Further Notice at ¶36.

¹⁷ See CBS Comments at 6.

¹⁸ Report and Order in Gen. Docket 83-1009, 100 FCC 2d 17 (1984).

¹⁹ These figures are derived from the database of the Security Data Company, Inc. As we previously stated, while it may not be possible to calculate what portion of this increase was due to attribution rule changes as opposed to multiple ownership rule changes, it is beyond question that the combined impact of these actions was to promote investment in the industry.

additional investment. Table A of that Appendix shows that 37.5 percent of active voting stock holdings that are attributable fall within the five to 10 percent ownership range. This appears to mean that the five to 10 percent ownership interest range is very attractive to investors notwithstanding the fact that it is the category of attributable interest carrying the least possible influence or control. Investments in this range presumably would grow were this range to become nonattributable.

CBS submits there is ample evidence on which to conclude that raising the attribution benchmarks will precipitate additional capital investment in the industry. Conversely, there appears to be no evidence that a holder of 10 percent or less of a company's stock is in a position to wield influence likely to induce a licensee to take actions to protect that stockholder's investment. However, as CBS has previously stated, if nonattribution of the higher benchmarks is to turn on unpredictable assessments by the Commission regarding, for example, the significance of the minority shareholders' rights in individual corporations, it is preferable to retain the lower benchmarks.

Conclusion

The bright-line single majority shareholder and nonvoting stock exemptions should be left intact, as they facilitate capital formation in the industry and, by their nature, are not susceptible to abuse. If the Commission concludes that these exemptions should be limited, however, CBS believes that the "equity or debt plus" proposal, incorporating a 33 percent interest threshold and a sufficiently broad definition of "program supplier" that avoids discrimination, is a preferable alternative to continued application of the cross-interest policy.

Notwithstanding the difficulty of providing empirical proof that raising the attribution benchmarks will increase the flow of capital to the industry, there is ample indication that this would occur. The voting stock and passive investor benchmarks should be raised as proposed in the Commission's Notices.

Respectfully submitted,

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